LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 24 1953
HAROLD B. WILLEY, Clerk

No. 521

In the Supreme Court of the United States

OCTOBER TERM, 1952

CENTRAL BANK, A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument:	
Introduction and Summary	5
I. A contractor's tax indebtedness arising from performance of the contract may be set off by the United States against the contractor's assignee	10
A. An indebtedness which is a necessary consequence of performance of a contract is not independent of that contract within the meaning of the Assignment of Claims Act of 1940	10
B. The 1940 Act should be construed to protect the United States	16
1. The rights of the United States under the general anti-assignment and offset legislation	16
2. Legislative history and purpose of the 1940 Act	22
3. The Act of May 15, 1951, and its legislative history	27
II. The trust fund provisions of the Internal Revenue Code do not preclude the set-off	32
Conclusion	40
Appendix:	
1. Anti-assignment statutes	41
2. Set-off statutes	46
3. Internal Revenue Code	46

CITATIONS

Cases:

Allen v. *White*, 17 Wall. 207	39
Amer. Fire & Cas. Co. v. *Finn*, 341 U.S. 6	11
American Surety Co. v. *Bethlehem Bank*, 314 U.S. 314	21
Bailey v. *United States*, 109 U.S. 432	18
Billings v. *United States* 232 U.S. 261	18
Blair v. *Chicago*, 201 U.S. 400	22
Boughton v. *United States*, 13 C. Cls. 284	19
Browder v. *United States*, 312 U.S. 335	11
Brown v. *Duchesne*, 19 How. 183	27
Carl Byoir & Associates, Inc. v. *Tsung-Chi Yu*, 142 F. 2d 885, certiorari denied, 311 U.S. 699	39

Cases—Continued

	Page
Cherry Cotton Mills, Inc. v. *United States*, 327 U.S. 536	18, 20
Coconut Grove Exchange Bank v. *New Amsterdam Cas. Co.*, 149 F. 2d 73	21
Cummins Const. Corp., In re, 81 F. Supp. 193	21
Erwin v. *United States*, 97 U.S. 392	18
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380	14
Federal Land Bank v. *Bismarck Co.*, 314 U.S. 95	14
Frank, In re, 25 F. Supp. 1005	38, 39
Goodman v. *Niblack*, 102 U.S. 556	18
Grasso v. *Oehmann*, 54 A. 2d 570	35
Gratiot v. *United States*, 15 Pet. 336	19
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466	14
Great Northern Ry. Co. v. *United States*, 315 U.S. 262	27
Hardin County Sav. Bank v. *United States*, 106 C. Cls. 577, 65 F. Supp. 1017	19
Hercules Service Parts Corp. v. *United States*; decided April 2, 1953, C.A. 6	38, 39
Hobbs v. *McLean*, 117 U.S. 567	16
Independent Automobile Forwarding Corp., 118 F. 2d 537, reversed, *sub nom. United States* v. *New York*, 315 U.S. 510	39
Lambert Lumber Co. v. *Jones Engineering & Construction Co.*, 47 F. 2d 74	16
Leighton v. *United States*, 289 U.S. 506	36
Martin v. *National Surety Co.*, 300 U.S. 588	6, 16, 17
McGowan v. *Parish*, 237 U.S. 285	16
McKee v. *Lamon*, 159 U.S. 317	39
McKenzie v. *Irving Trust Co.*, 323 U.S. 365	17
McKnight v. *United States*, 98 U.S. 179	19
Milwaukee County v. *White Co.*, 296 U.S. 268	18, 36
Modern Industrial Bank v. *United States*, 101 C. Cls. 808	19, 25
National Bank of Commerce v. *Downie*, 218 U.S. 345	23, 25
National Surety Corp. v. *Bath*, 89 A. 2d 104	13
New York v. *Feiring*, 313 U.S. 283	34
Northern Pacific R. Co. v. *United States*, 330 U.S. 248	22
Nutt v. *Knut*, 200 U.S. 12	16
Old Colony Co. v. *Comm'r*, 301 U.S. 379	11
Ozanic v. *United States*, 188 F. 2d 228	18
Phillips v. *Commissioner*, 283 U.S. 589	36
Pittman v. *Home Owners' Loan Corp.*, 308 U.S. 21	14
Posadas v. *National City Bank*, 296 U.S. 497	22
Prairie State Bank v. *United States*, 164 U.S. 227	21
Price v. *United States*, 269 U.S. 492	22, 36
Rhode Island Discount Co. v. *United States*, 118 C. Cls. 262	19, 25
Roman, et al. v. *United States*, 11 C. Cls. 761	19

Page

Cases—Continued

Royal Indemnity Co. v. *United States*, 117 C. Cls. 736, 93 F. Supp. 891 15, 19, 21

Schmoll v. *United States*, 105 C. Cls. 415, certiorari denied, 329 U.S. 724 6, 15, 19

Shipe v. *Consumers Service Co.*, 28 F. 2d 53 39

Shriver v. *Woodbine Bank*, 285 U.S. 467 36

Snow v. *Powell*, 189 F. 2d 172 11

Standard Accident Ins. Co. v. *United States*, 119 C. Cls. 749, 97 F. Supp. 829 19, 21

Tiger v. *Western Investment Co.*, 221 U.S. 286 27

United States v. *Aetna Surety Co.*, 338 U.S. 366 17, 18

United States v. *American Surety Co.*, 158 F. 2d 12 18-19

United States v. *Amer. Trucking Ass'ns*, 310 U.S. 534 11

United States v. *Bank of North Carolina*, 6 Pet. 29 22

United States v. *Chamberlin*, 219 U.S. 250 36

United States v. *First Capital Nat. Bank*, 89 F. 2d 116 35

United States v. *Fogarty*, 164 F. 2d 26 34

United States v. *Glenn L. Martin Co.*, 308 U.S. 62 13

United States v. *Herron*, 20 Wall. 251 22

United States v. *Hutcheson*, 312 U.S. 219 27

United States v. *Johnston*, 268 U.S. 220 33, 35

United States v. *Kansas Flour Corp.*, 314 U.S. 212 13

United States v. *Munsey Trust Co.*, 332 U.S. 234 6, 9, 18, 19, 20

United States v. *New York*, 315 U.S. 510 12, 13, 34, 38, 39

United States v. *Powers*, 307 U.S. 214 22

United States v. *Sampsell*, 193 F. 2d 154 38, 39

United States v. *Shannon*, 342 U.S. 288 16, 17

United States v. *Standard Rice Co.*, 323 U.S. 106 13

United States v. *Swedlow Engineering Co.*, 100 F. Supp. 796, pending on appeal *sub nom. Firemen's Fund Indemnity Co.* v. *United States* (C.A. 9) 13

U.S. Fidelity & Guaranty Co. v. *Triborough Bridge Authority*, 297 N.Y. 31, 74 N.E. 2d 226 21

U.S. Fidelity & Guaranty Co. v. *United States*, 201 F. 2d 118 13

Wooton v. *United States*, 114 C. Cls. 608, 86 F. Supp. 143, certiorari denied, 339 U.S. 903 18

Statutes:

Act of June 27, 1942, 56 Stat. 410 26

Act of July 26, 1947, 61 Stat. 501, 508, 31 U.S.C., Supp. III, 203 43

Act of May 15, 1951, 65 Stat. 41 (31 U.S.C., Supp. V, 203, 41 U.S.C., Supp. V, 15) 2, 6, 7, 28, 43

Anti-Assignment Statute (R.S. 3477, as amended, 31 U.S.C., 1934 ed., 203) 2, 5, 6, 16, 22, 41

Assignment of Claims Act of 1940 (54 Stat. 1029, 31 U.S.C. 203) 2, 3, 5, 8, 10, 26, 41

Current Tax Payment Act of 1943, 57 Stat. 126 34

Statutes—Continued

	Page
Internal Revenue Code (26 U.S.C.):	
Sec. 35	35
Sec. 1400	2, 12, 34, 46
Sec. 1401	2, 12, 34, 47
Sec. 1401(a)	47
Sec. 1401(b)	47
Sec. 1427	35
Sec. 1608	35
Sec. 1622	12
Sec. 1622(a)	2, 34, 47
Sec. 1622(d)	34
Sec. 1623	2, 12, 34, 35, 47
Sec. 1627	34
Sec. 2707(c)	4, 33
Sec. 3661	2, 32, 33, 35, 36, 47
National Industrial Recovery Act of June 16, 1933, 48 Stat. 205, 40 U.S.C. 407 (1940 Ed.):	
Sec. 207	26
Revenue Bill of 1934, 48 Stat. 768	36
Revised Statute 236, as amended, 42 Stat. 24, 31 U.S.C. 71, Sec. 236	46
Revised Statutes 3737, 41 U.S.C. 15	16
Revised Statute 3737, 41 U.S.C. 15 (1934 Ed.)	16
Social Security Act of 1935, 49 Stat. 620:	
Sec. 801	34
Sec. 802	34
18 U.S.C. 648	33
18 U.S.C. 649	33
28 U.S.C. 1346(c)	16
28 U.S.C. 1503	2, 16, 46
28 U.S.C. 2508	16
31 U.S.C. 71	2, 16, 22, 46
31 U.S.C. 203	26
31 U.S.C. 227	16
41 U.S.C. 15	26
50 U.S.C. App. 1107, as implemented by Executive Order No. 9112, March 26, 1942, 7 F.R. 2367	15
Miscellaneous:	
American Bankers Association, Bank Management Publication No. 101, *War Loans* (1943)	15
Black's *Law Dictionary* (3rd Ed., 1933), p. 950	11
Comp. Gen. Dec. B-72929 (May 18, 1950)	25, 28
Comp. Gen. Dec. B-84138 (May 17, 1949)	28
26 Comp. Gen. 424	28

Miscellaneous—Continued

	Page
24 Comp. Gen. 603	28
30 Comp. Gen. 98	25, 28
86 Cong. Rec. 12556-12557	26
86 Cong. Rec. 12556-12560	23
86 Cong. Rec. 12559	25
86 Cong. Rec. 12803	11, 24
86 Cong. Rec. 13121-13122	23
86 Cong. Rec. 13135	26
97 Cong. Rec. 4330	31
Federal Reserve Board Regulation V, 7 F.R. 2773, revised, 9 F.R. 11148, 12 C.F.R. 2231-5 (1944 Supp.)	15
Hearings before the Senate Committee on Banking and Currency on S. 4340, 76th Cong., 3rd sess.:	
p. 1	24
p. 2	22, 24
p. 3	23
Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 82nd Cong., 1st sess., on H. R. 2947, pp. 61-64	30, 31
H. R. 10464, 76th Cong., 3rd sess.	22
H. Rep. No. 1385, 73rd Cong., 2d sess., p. 32	37
H. Rep. No. 2925, 76th Cong., 3rd Sess., p. 2	24
H. Rep. No. 376, 82nd Cong., 1st Sess.:	
p. 1	28
p. 2	28
p. 4	30
H. R. 2947, 82nd Cong., 1st sess.	30
H. R. 3693, 82d Cong., 1st sess.	31
Nichols, *Assignment of Claims Act of 1940*, 12 U. of Pitt. L. Rev. 538, 541-546 (1951)	16
Note, 60 Harv. Law Rev. 786 (1947)	38
13 Op. Atty. Gen. 482	16
Restatement of Trusts, § 198	39
2 Scott, *Trusts:*	
§ 198.1	38
§§ 198-198.3	39
S. 4340, 76th Cong., 3rd sess.	22
S. Rep. No. 558, 73rd Cong., 2d sess., p. 53	37
S. Rep. No. 2136, 76th Cong., 3rd sess., p. 2	24
S. Rep. 217, 82nd Cong., 1st sess., p. 2	28, 30
S. 998, 82nd Cong., 1st sess.	30
Treas. Reg. 106:	
Sec. 402.304	34

Miscellaneous—Continued

Page

Treas. Reg. 116:
Sec. 405.301 34
Sec. 405.401 35
Webster's *New International Dictionary, Unabridged* (2nd Ed., 1934), p. 1262 11

2 Williston, *Contracts* (Rev. Ed.):

pp. 1244-1245 20
pp. 1253-1254 20

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 521

CENTRAL BANK, A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 75-79) is reported at 105 F. Supp. 992.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1952. On August 13, 1952, petitioner filed a motion for a new trial. The motion was overruled on October 7, 1952. (R. 79.) The petition for certiorari was filed on December 30, 1952, and was granted on March 9, 1953 (R. 80). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

QUESTION PRESENTED

A government contractor assigned the proceeds of his contract to a bank pursuant to the Assignment of Claims Act of 1940. As authorized by that Act, the contract provided that payments to the assignee shall not be subject to set-off for an indebtedness of the contractor arising independently of the contract. The contractor failed to pay federal income and social security taxes which it withheld from the wages of its employees engaged in performing the contract work. The question is whether the contractor's tax indebtedness is, within the meaning of the 1940 Act, an indebtedness "arising independently of such contract," which may not be set-off against moneys owed by the Government on the contract.

STATUTES INVOLVED

The pertinent provisions of the following statutes are set forth in the Appendix, *infra*, pp. 40-47: the Anti-Assignment Statute (R.S. 3477, 31 U.S.C. 203, 1934 Ed.); the Assignment of Claims Act of 1940 (54 Stat. 1029, 31 U.S.C. 203); the Act of May 15, 1951 (65 Stat. 41, 31 U.S.C. Supp. V, 203); the offset statutes (28 U.S.C. 1503; 31 U.S.C. 71); and Sections 1400, 1401, 1622(a), 1623 and 3661 of the Internal Revenue Code (26 U.S.C.).

STATEMENT

Graham Ship Repair Company, a partnership, of Oakland, California, entered into a contract with the Navy Department on December 30, 1944, for ship repair work (R. 73). The contract was for the

period of the war plus six months but could be terminated sooner by the Navy, upon a determination that termination would be for the best interests of the Government (R. 46, 48). As permitted by the Assignment of Claims Act of 1940, 54 Stat. 1029, 31 U.S.C. 203, *infra*, pp. 40-42, the contract had a provision authorizing the contractor to assign the proceeds of the contract to a bank (R. 34) and payments to the assignee bank were not to be "subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract" (R. 35).

After entering into the contract, the contractor made an assignment of the expected proceeds of the contract to petitioner, a bank at Oakland, California, to secure a loan made by petitioner to finance the work. The assignment was made on January 31, 1945. R. 73, 56-58. The Contracting Officer, the Disbursing Officer, and the General Accounting Office were duly notified of the assignment, as required by the Assignment of Claims Act, and all acknowledged receipt of notice in February 1945 (R. 73, 58-62).

Petitioner advanced substantial sums of money to the contractor to pay for labor and material costs in connection with the work under the contract. During the course of performance, the contractor withheld the sums of $453,469.55, for income taxes, and $11,462.91, for federal unemployment taxes, from the salaries and wages of its employees who were doing the work called for by the contract. Sections 1401 and 1622 of the Internal

Revenue Code required the contractor, as an employer, to make these withholdings. Instead of paying these amounts to the Collector of Internal Revenue, the partners of the contracting firm converted the money to their own use. (R. 73.) Because of the contractor's failure to pay the amounts withheld, the Navy declined to issue further job orders to the contractor after March 31, 1946, and terminated the contract (R. 74, 76). The partners of the contracting firm were later indicted, under Section 2707 (c) of the Internal Revenue Code, and pleaded guilty to charges of a willful attempt to evade and defeat the payment of the taxes withheld (R. 74).

When the contract was terminated, the contractor's indebtedness to the Government for unpaid withholding taxes, with interest and penalties, aggregated $616,750.95. At that time, the Government owed the contractor, for work performed under the contract, the sum of $110,966.08. (R. 74.)

Petitioner, as assignee, made claim for the balance due from the Government under the contract. The Commissioner of Internal Revenue also claimed that amount. By decision dated May 18, 1950, the Comptroller General ruled that the sum of $110,966.08 due the contractor was a proper set-off against the contractor's tax indebtedness,

---

[1] In December 1946, the Commissioner of Internal Revenue made appropriate assessments of the taxes due from the contractor and after that, in the same month, the Collector of Internal Revenue at San Francisco filed liens against the contractor for such taxes, which liens were duly recorded. (R. 74-75.)

and therefore denied petitioner's claim. (R. 74, 62-67.) Thereafter, by the issuance of appropriate Certificates of Settlement, the Comptroller General effected the aforesaid set-off and in that way reduced the contractor's tax indebtedness to $415,018.17 (R. 74). This suit by petitioner followed.

The Court of Claims rendered judgment for the United States, holding that the set-off was proper, that the tax indebtedness arose by reason of and in connection with the assignor's performance of work under the contract, that the petitioner knew its assignor was required to withhold and pay taxes, that the tax obligation was directly associated with the contract, and that, therefore, the indebtedness did not arise independently of such contract within the meaning of the Assignment of Claims Act of 1940 (R. 75-79).

ARGUMENT

Introduction and Summary

A. Petitioner's assignor owed to the Government the amount of income and federal unemployment taxes which it had withheld pursuant to I.R.C. 1401 and 1622 from the salaries and wages of its employees who were engaged in the performance of the Navy contract (R. 73). Whether the Government has surrendered its right to set off such an indebtedness depends upon whether this tax obligation is, within the meaning of the Assignment of Claims Act of 1940, an "indebtedness * * * arising independently of such contract." *Infra*, p. 42. That Act amended the Anti-Assignment Statutes (R.S. 3477 and 3737; *infra*, p. 40.) But in 1951, the

1940 Act was itself amended in significant respects (Act of May 15, 1951, *infra*, pp. 42-45). Consideration of each of these three stages of legislation bearing on the assignment of claims against the United States is necessary in determining the particular question of statutory construction presented in this case.

Under the Anti-Assignment Statute, prior to the 1940 amendment, an assignment such as was made to petitioner was "absolutely null and void" as against the United States. R.S. 3477. Although the assignment might have been enforcible as between the assignor and assignee (*Martin* v. *National Surety Co.*, 300 U.S. 588), it could not operate to the detriment of rights of the United States and any set-off which the United States had against the assignor would have been effective against the assignee (*United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240; *Schmoll* v. *United States*, 105 C. Cls. 415, certiorari denied, 329 U.S. 724).

To assist in the national defense program and to facilitate the financing of public contracts, the 1940 Act validated the assignment of moneys due or to become due under any Government contract if the assignment were made to a bank, trust company, or other financing institution. The Act also made a limited surrender of the Government's broad rights of set-off. It authorized the inclusion, in contracts entered into by the War or Navy Department (but not in contracts of other government departments or agencies), of a provision "that payments to an assignee of any claim arising

under such contract shall not be subject to reduction or set-off"; if the contract did so provide, then "such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States *arising independently of such contract*" (emphasis added).[2] This type of "no set-off" provision was included in the contract entered into between petitioner's assignor and the Navy (R. 34-35).

The 1951 Act, which amended the prior law in several respects, considerably enlarged the scope of the "no set-off" provision by barring the United States from offsetting not only an indebtedness of the assignor "which arises independently of such contract", but also "any liability of the assignor on account of (1) renegotiation * * *, (2) fines, (3) penalties * * *, or (4) taxes, social security contributions; or the withholding or nonwithholding of taxes or social security contributions, *whether arising from or independently of such contract*" (emphasis added). In contrast with other provisions of the 1951 Act which had some retrospective effect, the operation of the enlarged "no set-off" provision was to be prospective only (see *infra*, pp. 44-45).[3]

---

[2] Although adopted as a defense measure, the 1940 Act was enacted as permanent legislation. Compare, however, the 1951 Act in which the authority to insert the "no set-off" provisions in contracts was confined to time of war or national emergency (*infra*, p. 44).

[3] This amendment, which was not mentioned in the opinion below, nor called to this Court's attention on petition for certiorari, and is not referred to in petitioner's brief on the merits, nullifies the importance of the issue presented by this case. The issue will not arise under the 1951 Act since the express

B. The words "independently of [the] contract" in the 1940 Act should be accorded their plain and usual meaning, *viz.*, not dependent or contingent or conditioned upon, completely disassociated from, the contract. An indebtedness which arises independently of the contract, in the words of the sponsor of the 1940 legislation, is one which has "no relationship whatever to the contract." The legislative history shows that Congress intended to save to the Government the right to set off against the assignee any indebtedness of the contractor arising as a consequence of the contract. Here, the assignor's tax indebtedness was contingent upon and arose as an inevitable consequence of performance of the contract. Since the Internal Revenue Code required the contractor, as an employer, to withhold part of the gross wages of its employees engaged in performing the contract, the tax indebtedness was an indivisible part of the obligation to pay wages and could have no existence apart from the payment of wages under the contract.

Under the 1940 Act, where the contractor's indebtedness is not independent of the contract, the assignee has no greater rights than the contractor whose claim he asserts. The general law of as-

---

language of that Act settles the matter. It is unlikely that a decision by this Court is necessary for the future administration of the 1940 Act; there is no conflict of decisions involved; petitioner has not pointed to any other pending case raising the issue and our own search and inquiry reveal none. It is unfortunate that the existence of the 1951 Act was not made known to the Court, at the petition stage, either by petitioner or the Government, and we regret the Government's failure to call attention to that Act in its brief in opposition.

signments permits an obligor to set off against the assignee claims against the assignor which arise out of the assigned obligation. The construction contended for by the Government in this case would simply effect the same result, and, in any event, the general set-off statutes give the United States the largest powers of set-off. The Government is not, as petitioner contends, merely a general creditor of the assignor, but "the best secured of creditors" since it retains the money necessary to create a fund to pay other creditors. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240. As against an assignee standing in the shoes of the contractor, the claims of the United States must prevail.

If there be ambiguity in the language of the 1940 statute, it should be resolved in favor of the United States under the admonition to avoid a construction leading to loss to the public treasury. And since the Assignment of Claims Act of 1940 is in derogation of the Government's broad rights of set-off and of the absolute protection formerly given under the Anti-Assignment Statutes, there is no occasion for any broader reading than is demanded by the precise aim of Congress in relaxing the old requirements. The basic purpose of the 1940 Act was not to favor the assignee bank, but to assist the government contractor in obtaining financing and, at the same time, to protect the Government's interests adequately. To permit set-off of the instant tax claims would not defeat the purposes of the 1940 Act, but, rather, would properly accom-

modate the two goals of protecting the Government and of easing the contractor's obtaining of credit.

C. Nor is there anything in the Internal Revenue Code to bar the Government's claim. The Code required the contractor to withhold taxes "as and when" wages were paid and immediately created liability in the contractor for the amounts deducted or which should have been deducted. Such liability is enforcible by an action for debt. Section 3661 of the Code, providing that when a person withholds taxes from another such amount shall be held in trust for the United States, does not, as petitioner contends, relegate the United States to trust remedies exclusively, but merely provides remedies which are alternative to and in addition to its other methods of collection. Hence, the Government's claim here is not exclusively for "embezzlement" of trust moneys, but may be rested on the debt which arose the moment wages were paid.

I

A Contractor's Tax Indebtedness Arising from Performance of the Contract May Be Set Off by the United States against the Contractor's Assignee.

A. *An Indebtedness which Is a Necessary Consequence of Performance of a Contract Is Not Independent of that Contract Within the Meaning of the Assignment of Claims Act of 1940.*

The only indebtedness of the assignor which the Government may not set off against an assignee under the 1940 Act is one "arising independently of [the] contract." These are not words of art,

but are common words of popular usage and, in the absence of some dominant contrary reason, they should be accorded their plain and usual meaning. *Old Colony Co. v. Comm'r*, 301 U.S. 379, 383; *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543; *Browder v. United States*, 312 U.S. 335, 338. The critical word is "independently." The term "independent" means "not dependent"; "not contingent or conditioned"; "separate; exclusive; irrespective"; "uncontrolled."[4] To be "independent" requires that there be "complete disassociation" (cf. *Amer. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 12; *Snow v. Powell*, 189 F. 2d 172, 174 (C.A. 10)). An indebtedness which is independent of the contract, Senator Barkley who sponsored the 1940 legislation indicated, is one which has "no relationship whatever to the contract" (86 Cong. Rec. 12803). To be independent of the contract, as was aptly stated by the court below, the indebtedness must arise "irrespective of, exclusive of, and separate from the contract, and must have no direct relation with such contract" (R. 78). Anything less would not conform with the ordinary and natural meaning of the word "independent."

Measured by this standard, it cannot be said that the contractor's tax indebtedness arose "independently" of the contract. The agreement contemplated that the ship repairs would be performed by employees hired by the contractor. It included various provisions controlling working conditions

[4] Webster's *New International Dictionary, Unabridged* (2d Ed., 1934), p. 1262; and see Black's *Law Dictionary* (3rd Ed., 1933), p. 950.

(*e.g.*, R. 36, 39-40), requiring reports showing the items of labor, the hours worked, the wages paid, etc. (R. 19-20, 25), and it provided also that the assignor be compensated partly on the basis of Payable Hours of Direct Labor, as defined in the contract (R. 15-16). There could be no performance without the services of the assignor's employees, and as soon as performance was undertaken and wages were paid the tax indebtedness necessarily arose. This follows from the provisions of the Internal Revenue Code (I.R.C. 1401, 1622) which required the contractor-employer to deduct and withhold stated percentages of the gross amounts of wages paid to its employees (R. 73). The moment the wages were paid, the assignor became liable directly to the Government (I.R.C. 1623), in the place of its employees (I.R.C. 35), to the extent of the taxes which were or should have been withheld (*United States* v. *New York*, 315 U.S. 510, 516). The contract could not have been performed without giving rise to that tax obligation; hence, the tax indebtedness was not "completely disassociated" from the contract. On the contrary, its existence was contingent upon and an inevitable consequence of performance of the contract. An indebtedness which necessarily and inescapably must be incurred in the performance of a contract does not arise "independently" of the contract.

Here, the relationship of the tax obligation to the contract was even more than a "but for" relationship. Taxes arising during the course of performance of the contract were considered by the

Navy in establishing the job rates and had a direct connection with the costs of the contract (R. 63-64, 67).[5] Just as wages were a cost of the contract, so was the tax indebtedness, because, as an integral part of the contractor's obligation to pay wages, there was a concurrent obligation to withhold part of those wages and pay that part to the Government. Stated another way, a portion of the wages which accrued in performing the contract had to be paid directly to the Government.[6] The failure to make that payment is the reason the contract was terminated (R. 73, 64). It is not necessary to

[5] The close relationship between the contract price and the tax liabilities incurred by a contractor during performance is reflected in express provisions in some government contracts calling for an adjustment in the price, following the imposition or modification of taxes. See *United States* v. *Kansas Flour Corp.*, 314 U.S. 212; *United States* v. *Standard Pipe Co.*, 323 U.S. 106; compare, *United States* v. *Glenn L. Martin Co.*, 308 U.S. 62.

[6] For the purposes of this case, it makes no difference whether the moneys withheld be regarded as part of the gross wages earned by the employees or as a tax upon the employer. Compare *U. S. Fidelity & Guaranty Co.* v. *United States*, 201 F. 2d 118 (C.A. 10), with *United States* v. *Swedlow Engineering Co.*, 100 F. Supp. 796, 798 (S.D. Cal.), pending on appeal *sub nom. Firemen's Fund Indemnity Co.* v. *United States* (C.A. 9), and *National Surety Corp.* v. *Barth*, 89 A. 2d 104, 109 (N.J. Super.). In these cases, following default by a contractor under a non-government contract, the United States, claiming employee wage withholding taxes, was competing with the contractor's surety, claiming subrogation, for funds owed under the contract. The surety, which has agreed to be liable for all wage claims, is clearly subordinate to the United States if the sums withheld are wages. Whether representing wages or taxes—a question not raised or decided in *United States* v. *New York*, 315 U.S. 510—the indebtedness in the instant case was contingent upon performance of the contract and therefore was not independent of the contract. But if the amounts withheld are deemed wages, then the claim of the United States may be based upon an assignment by operation of law of the employees' rights to that part of their gross wages which was withheld. See *infra*, fn. 41. This again emphasizes the close relationship between the assignor's indebtedness and the contract.

show that this indebtedness was created by the terms of the contract, rather than by the revenue laws, to escape the set-off bar of the 1940 Act (compare Pet. Br. pp. 12-13); it suffices if the relationship between that indebtedness and the contract is such as to preclude their being independent of each other. There is no such independence if the tax indebtedness could not exist apart from the contract and if, in fact, the obligation arose as a natural and inevitable incident of performance of the contract.

Petitioner suggests (Br., p. 9) that permissible set-offs should be limited to those arising from the Government's actions as the second contracting party, and that other government claims, such as demands for taxes, should be excluded. But there is no warrant in the language or purposes of the 1940 Act for such a restriction. To define the excluded class, the Act uses the general term "independently of such contract" rather than a term such as "claims not under the contract" or "claims other than those for breach of the contract", which would limit the United States to its demands as a contracting party.[7] And the sponsor of the Act, Senator Barkley, said on the floor that the exclusion was directed to "an indebtedness which the contractor may owe the Government on account of some other contract or some other situation. * * *

[7] Of course, the United States acts in a governmental capacity both when it enters into a contract and when it collects taxes. *Federal Land Bank* v. *Bismarck Co.*, 314 U.S. 95, 102; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-4; *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 32; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477.

a claim against the contractor on account of something else which had no relationship whatever to the contract and the defense program" (86 Cong. Rec. 12803).

Nor can petitioner contend that when it took the assignment it was unaware of a possible tax claim incident to performance under the contract. Petitioner was as aware as its assignor, if not through actual knowledge then certainly constructively,[8a] that wages would have to be paid for labor to perform the contract, that the contractor was required by law to withhold part of such wages, and that until that portion was paid to the Collector of Internal Revenue the contractor would be indebted to the Government. This was merely one of the liabilities, along with others such as for the cost of materials, rents, equipment, etc., which would be incurred in performing the contract.[8b] In considering the risks involved in making the loan, petitioner should reasonably have included the matter of taxes because the tax obligation was an indispensible ingredient of the obligation to pay wages and wage-payments were, of course, an essential element in the performance of the contract.

[8a] Cf. *Schmoll* v. *United States*, 105 C. Cls. 415, 455, certiorari denied, 329 U.S. 724; *Royal Indemnity Co.* v. *United States*, 111 C. Cls. 736, 746-7, 93 F. Supp. 891, 894.

[8b] Government guarantees of loans were available if a bank could not, by applying normal credit standards, extend a loan to a contractor. See 50 U.S.C. App. 1107 as implemented by Executive Order No. 9112, March 26, 1942, 7 F.R. 2367; Federal Reserve Board Regulation V, 7 F.R. 2773, revised, 9 F.R. 11148, 12 C.F.R. 223.1-5 (1944 Supp.). See also American Bankers Association, Bank Management Publication No. 101, *War Loans* (1943).

B. The 1940 Act Should Be Construed to Protect the United States.

1. *The rights of the United States under the general anti-assignment and offset legislation.*—From its earliest years, the Government has been concerned with the need of maintaining close supervision over the collection and expenditures of public moneys and with providing a full measure of protection in the ascertainment and allowance of claims against it.[8c] The Anti-Assignment Statutes[9] and the laws which give the United States broad rights of offset and counterclaim[10] constitute an integrated body of legislation intended to enforce this purpose of protecting the United States in its fiscal operations and management.

a. As for the Anti-Assignment Statutes, the Court has time and again emphasized that protective purpose.[11] Before it was amended by the 1940 Act, R.S. 3477 declared that all transfers and assignments of claims upon the United States and all powers of attorney for receiving payment "shall be

---

[8c] For a review of some of the legislation, see *Lambert Lumber Co.* v. *Jones Engineering & Construction Co.*, 47 F. 2d 74, 79-81 (C.A. 8); 13 Op. Atty. Gen. 482; Nichols, *Assignment of Claims Act of 1940*, 12 U. of Pitt. L. Rev. 538, 541-546 (1951).

[9] R.S. 3477, 31 U.S.C. (1934 ed.) 203 (*infra*, p. 40); R.S. 3737, 41 U.S.C. (1934 ed.) 15.

[10] 28 U.S.C. 1346(c), 1503 (*infra*, p. 45), 2508; 31 U.S.C. 71 (*infra*, p. 45), 227.

[11] *E.g.*, *Hobbs* v. *McLean*, 117 U.S. 567, 576; *Nutt* v. *Knut*, 200 U.S. 12, 20; *McGowan* v. *Parish*, 237 U.S. 285, 294-295; *Martin* v. *National Surety Co.*, 300 U.S. 588, 594-595; *United States* v. *Shannon*, 342 U.S. 288, 291-293.

absolutely null and void" unless executed after the allowance of the claim, after ascertainment of the amount due, and after the issuance of a warrant for the payment of the claim.[12] Not designed as a means of regulating the rights *inter se* of the parties to the assignment (*McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 369; *Martin* v. *National Surety Co.*, 300 U.S. 588, 595), the restrictions upon assignment are intended to save to the United States defenses to claims by an assignor which might not be applicable to an assignee, to prevent possible multiple payments of claims, to preclude persons from peddling or speculating in such claims, to avoid the necessity of investigating numerous alleged assignments, and to enable the Government to deal only with the original claimant.[13] *United States* v. *Shannon*, 342 U.S. 288, 291-293; *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 371.

Protection to the Government being the predominant and controlling consideration, the provisions of the anti-assignment legislation have been rigidly adhered to and strictly applied where the rights of the United States are at stake, even in the situation, as in *United States* v. *Shannon*, *supra*, where all possible claimants are before the court. Only when the assignment is of a type which would not

---

[12] The transfer of the contract, or any interest therein, was forbidden by R.S. 3737, 41 U.S.C. (1934 Ed.) 15 which further provided that "any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

[13] See also, fn. 22, *infra*.

tend to frustrate the purposes of the law has this strictness been relaxed.[14]

b. The offset laws are equally potent in their protective purpose and effect. They express, as Judge Learned Hand said, "the general policy * * * that claims against the United States are always to be subject to set-off." *Ozanic* v. *United States*, 188 F. 2d 228, 231 (C.A. 2); cf. *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536, 539-540. If this suit had been brought by the contractor-employer, there is no question but that the Government could have set off the moneys owed under the contract in extinguishment of the contractor's tax liability. The offset would have been proper without regard to whether the tax obligation arose out of or was independent of the contract upon which the claimant sued. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239; *United States* v. *American Surety Co.*, 158 F. 2d 12 (C.A. 5); see, *Wooton* v. *United States*, 114 C. Cls. 608, 611, 86 F. Supp. 143, 144, certiorari denied, 339 U.S. 903.[15] For, as this Court has often asserted, the Govern-

---

[14] *E.g.*, the restrictions have been held inapplicable to assignments by operation of law (*United States* v. *Aetna Surety Co.*, *supra*) and to those voluntary assignments which are closely akin to the involuntary, such as a transfer by will (*Erwin* v. *United States*, 97 U.S. 392, 397) or a general assignment for the benefit of creditors (*Goodman* v. *Niblack*, 102 U.S. 556, 560-561). Also, since the United States is the only party to be protected, it may waive or disregard the anti-assignment provisions and pay the assignee (*Bailey* v. *United States*, 109 U.S. 432).

[15] Tax claims, being quasi-contractual in nature (*Milwaukee County* v. *White Co.*, 296 U.S. 268, 271) and recoverable "as for a debt in every case where not prohibited by statute" (*Billings* v. *United States*, 232 U.S. 261, 288), are clearly within the coverage of the offset statutes. *United States* v. *American*

ment has the same right which belongs to every creditor "to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *United States* v. *Munsey Trust Co., supra; McKnight* v. *United States,* 98 U.S. 179, 186; *Gratiot* v. *United States,* 15 Pet. 336, 370. The authority of the Comptroller General and the jurisdiction of the Court of Claims "to strike a balance between the debts and credits of the government" in such a situation is not open to question. *United States* v. *Munsey Trust Co., supra,* 332 U.S. at 240.

Since the 1940 Act retains to the United States the right to set off against the assignee whatever claims it has against the assignor—except those which arise independently of the contract—it is indisputable that these rules apply if the assignor's debt is not independent of the contract. The situation is then the same as if the assignor itself had brought the suit; the assignee simply stands in the shoes of the assignor. Cf. *Royal Indemnity Co.* v. *United States,* 117 C. Cls. 736, 748, 93 F. Supp. 891, 895; *Hardin County Sav. Bank* v. *United States,* 106 C. Cls. 577, 599, 65 F. Supp. 1017, 1022; *Modern Industrial Bank* v. *United States,* 101 C. Cls. 808, 820. It makes no difference that the United States acquired its claim after it received notice of the assignment to petitioner. Even un-

---

Surety Co., 158 F. 2d 12 (C.A. 5); *Standard Acc. Ins. Co.* v. *United States*, 119 C. Cls. 749, 97 F. Supp. 829; *Rhode Island Discount Company* v. *United States*, 118 C. Cls. 262, 286; *Schmoll* v. *United States*, 105 C. Cls. 415, 455, certiorari denied, 329 U.S. 724; *Boughton* v. *United States*, 13 C. Cls. 284; *Roman et al.* v. *United States*, 11 C. Cls. 761.

der the private law of assignments, a claim acquired after notice of the assignment may be set off against the assignee if that claim stems from the assigned contract. 2 Williston, *Contracts* (Rev. Ed.), pp. 1253-1254. The Government has that right, but it can also rely on the general provisions of the offset legislation. Once the "no offset" clause of the 1940 Act is out of the way,[16] the Government may look to the broad scope of the general set-off statutes for the authority and jurisdiction to effectuate the set-off. Cf. *Cherry Cotton Mills, Inc.* v. *United States, supra*; *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240. As the Court put it in the *Munsey Trust* case, the United States is in these circumstances "the best secured of creditors." Its security is its "justified refusal to pay what [it] owes until [it] is paid what is due [it]" (332 U.S. at 240). "Insofar as the suitor in the Court of Claims asserted the contractor's title to the sum in dispute, that court was under statutory duty to recognize the undisputed claim for damages of the United States" (*ibid.*).[17]

---

[16] Where the Government's claim is independent of the contract, the assignee may obtain greater rights under the 1940 Act than he would have under the general law of assignments. For the general rule is that an assignee of a non-negotiable chose in action, though he buys it for value and in good faith, takes it subject to all defenses which the obligor may have had against the assignor, including not only those defenses which relate to the assigned obligation itself, but also subject to rights of set-off, or counterclaim arising out of separate matters which the obligor might have asserted against his original creditor, the assignor." 2 Williston, *Contracts* (Rev. Ed.), pp. 1244-1245.

[17] Cases (cited at Pet. Br. pp. 14-15) in which the United States did not assert a claim of its own but was merely a

c. In determining whether the tax indebtedness involved here is within or without the "no set-off" clause of the 1940 Act, it is proper to read that Act's language in its historic setting of a consistent legislative purpose to provide protection to the Government's fiscal operations and of a continuing body of decisional law seeking to achieve that end. On the one hand, before 1940 all assignments were "absolutely null and void" as against the United States (R.S. 3477); on the other, "all claims and demands whatever by the Government" could be

---

stakeholder, are inapposite. There, the question usually is one of priority, as between the contractor's surety and his assignee-bank, to funds owed by the United States. The surety prevailed before the 1940 Act. *Prairie State Bank* v. *United States*, 164 U.S. 227. The surety has also prevailed where the bank claimed under an assignment authorized by the 1940 Act. *E.g.*, *Royal Indemnity Co.* v. *United States*, 117 C. Cls. 736, 93 F. Supp. 891; but contrast, *Coconut Grove Exchange Bank* v. *New Amsterdam Cas. Co.*, 149 F. 2d 73 (C.A. 5). The rights of the surety to the contract funds attach when the contract of suretyship is entered into (*Prairie State Bank, supra*) and are fortified by rights of subrogation; *i.e.*, the surety may not only assert the contractor's rights (under an assignment prior in time to the bank's), but also may resort to the remedies and securities of the one whose claim it pays. Cf. *American Surety Co.* v. *Bethlehem Bank*, 314 U.S. 314, 317; and see, *In re Cummins Const. Corporation*, 81 F. Supp. 193 (D. Md.). The assignee, on the other hand, obtains no greater rights than the contractor possessed, and the contractor's rights are "subordinate to those of the *United States* and the sureties" (*Prairie State Bank, supra*, 164 U.S. at 240) (emphasis added). Compare, *U.S. Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N.Y. 31, 74 N.E. 2d 226 (holding the surety's rights to contract funds, owed by a third party to the defaulting contractor, superior to claims of the United States for the contractor's income taxes). When, however, the United States, as in this case, is asserting a claim to the funds in its own possession, its right of set-off, under the *Munsey Trust* decision, is superior both to the rights of the surety and of the assignee. See also, *Standard Accident Ins. Co.* v. *United States*, 119 C. Cls. 749, 97 F. Supp. 829 (tax set off by United States permitted against surety).

set off (31 U.S.C. 71). Since the 1940 Act is in derogation of the absolute protection formerly accorded the United States by the Anti-Assignment Statutes, and since it deprives the Government of the full offset contemplated by the set-off statutes, the "no set-off" clause should not be given any broader interpretation than is required by the needs which impelled Congress to act. Where there is doubt as to the meaning of a statute operating as a relinquishment of a public right or interest, that construction is to be adopted which works the least harm to the state and also accords with the legislative purpose. *Northern Pacific R. Co.* v. *United States*, 330 U.S. 248, 257; *United States* v. *Powers*, 307 U.S. 214, 217; *Blair* v. *Chicago*, 201 U.S. 400, 471-473; cf. *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505. Furthermore, a construction which would lead to a loss to the public treasury should not be adopted unless the intention of Congress is expressed in clear and explicit terms. *United States* v. *Herron*, 20 Wall. 251, 263-264; *United States* v. *Bank of North Carolina*, 6 Pet. 29, 35; *Price* v. *United States*, 269 U.S. 492, 500.

2. *Legislative history and purpose of the 1940 Act*—The bill[18] which later became the Assignment of Claims Act of 1940 was drafted and proposed by officials of the Federal Reserve System.[19]

---

[18] The same bill was introduced in both houses of Congress. Senator Barkley sponsored the measure in the Senate (S. 4340, 76th Cong., 3rd Sess.) and Representative Sumners in the House (H.R. 10464, 76th Cong., 3rd Sess.).

[19] See Hearing before the Senate Committee on Banking and Currency on S. 4340, 76th Cong., 3rd Sess., p. 2.

Its object was to facilitate the financing of public contracts and particularly to help small businessmen who did not have sufficient working capital to undertake large defense orders or sufficient assets to pledge as security for private loans. Such financing, it was believed, would be obtained more easily if the payments due or to become due from government contracts could be assigned as security to the lender.[20] It is significant, however, that

---

[20] *Ibid.*; see also, 86 Cong. Rec. 12556-12560; 13121-13122. Explaining the purpose of the bill, the Board of Governors of the Federal Reserve System called attention to the strict wording of R.S. 3737 and 3477 and the strict interpretation given in *National Bank of Commerce* v. *Downie*, 218 U.S. 345 (holding that assignments to banks as security for loans to finance government contract work were "null and void" as against the contractor's trustee in bankruptcy); and said (Hearing, *supra*, fn. 19, at p. 3):

> * * * As a consequence, banks and other lending agencies which might otherwise be willing to extend credit to finance the performance of contracts with the Government are unable to rely upon assignments of amounts payable under such contracts as security, because they would find themselves in the position of general creditors of the contractors in the case of bankruptcy even though the funds which they advanced may have made the fulfillment of the contracts possible.
>
> There are many manufacturers and other businesses, particularly the smaller ones, which may be deterred from bidding on contracts arising out of the program for national defense because they have inadequate amounts of working capital and may encounter difficulties in financing the performance of such contracts. If such businesses could offer security in the form of assignments of claims against the Government growing out of such contracts, they would in many instances be able to obtain the necessary credit from their own local banks and other financing institutions, which have large amounts of idle funds awaiting employment. In many instances such credit could be obtained more simply and quickly from local institutions than from the lending agencies of the Government, whose commitments usually have to be passed upon in Washington.

the bill, as introduced and as recommended by the committees of both houses, did not include any limitation upon the Government's right of set-off. This indicates that at the outset the bill was not intended to give an assignee bank priority over the Government's claims; rather, its proponents believed that it would suffice if the lender were assured priority over other general creditors, particularly in the event of insolvency.[21]

The provision barring the Government from setting off an indebtedness of the assignor arising independently of the contract was proposed as an amendment by Senator Barkley on the floor. 86 Cong. Rec. 12803. As noted above (pp. 14-15), he explained the words as meaning "an indebtedness which the contractor may owe the Government on account of some other contract or some other situation. * * * a claim against the contractor on account of something else which had no relationship whatever to the contract and the defense program." *(Ibid.)* This, we submit, marks the meaning of the

---

In recommending the bill favorably, the committees of both the House and Senate adopted this statement *verbatim* as their explanation of the bill. H. Rep. No. 2925, 76th Cong., 3rd Sess., p. 2; S. Rep. No. 2136, 76th Cong., 3rd Sess., p. 2.

[21] See fn. 20, *supra*. Petitioner (Br. p. 7) points to Senator Barkley's remark that the purpose of the bill is to permit the contract to be assigned as security, "then when the work is completed and the Government is ready to pay the contractor, naturally the bank has a first claim on it" (*Hearing*, *supra*, fn. 19, at p. 2). But it is obvious that Senator Barkley was not referring to any priority of the assignee over the Government, but, instead, to the assignee's priority over other claimants. If the Government were "ready to pay", in the Senator's words, it would not be asserting any claim of its own. Besides, the restriction on the Government's right of set-off was not in the bill nor had it been proposed at the time the remark was made. *Ibid.*, p. 1.

disputed clause: the indebtedness is independent of the contract if it has "no relationship whatever" to the contract". Both the Comptroller General and the court below have consistently applied this interpretation of the provision. *Modern Industrial Bank* v. *United States*, 101 C. Cls. 808, 820-821; *Rhode Island Discount Co.* v. *United States*, 118 C. Cls. 262, 286; 30 Comp. Gen. 98; Comp. Gen. Dec. B-72929 (May 18, 1950) (R. 62-67).

While the 1940 Act relaxes the restrictions upon assignments within a narrow area, it nevertheless reflects a recognition and continuation of, rather than a basic departure from, the long established policy protecting the interests of the United States. Its prime purpose was not, as petitioner contends, to protect the assignee bank, but was to aid the contractor in obtaining financing and still provide adequate protection to the Government. See 86 Cong. Rec. 12559, and *supra*, pp. 22-24. This purpose was accomplished by recognizing the validity of a contractor's assignment to a bank (thus nullifying the result reached in *National Bank of Commerce* v. *Downie*, *supra*, fn. 20) and, at the same time, by surrounding that assignment with conditions safeguarding the interests of the United States. Thus, the validity of assignments was recognized only when made to a bank, trust company, or other financing institution, including any Federal lending agency.[22] Even then, the assignment

[22] The Congressional debates reveal an additional reason for restrictions upon assignments; *viz.*, assignment of claims under a government contract would result in disclosure of the contents of the contract to the assignee and persons other than the

was conditioned upon the Government's consent since the contract could forbid it; and, unless permitted by the contract, the assignment was required to cover all unpaid amounts due under the contract, could be made to only one party, and the claim was not subject to further assignment. Notice had to be filed with the General Accounting Office, the contracting officer or the head of his agency, the disbursing officer, and the sureties, if any.

These provisions both reveal and achieve the two purposes of the Act—aiding the contractor and simultaneously protecting the Government. Hence, there is no merit to petitioner's argument that the general purpose of the 1940 Act will be defeated if tax claims are excluded from the "no set-off" clause, for the "no set-off" provision itself is not a *sine qua non* of achieving that general purpose.[23] The

---

contractor, and, since such contracts often deal with matters relating to the national defense, uncontrolled disclosure might be detrimental to the security of the nation. 86 Cong. Rec. 12556-7, 13135. For that reason, unlimited assignments to lending institutions were not permitted; instead, the Act prohibited the assignment of claims under a contract entered into after the date of approval of the Act if the contract forbids such assignment, and, as to contracts entered into prior to that date, prohibited the assignment unless consented to by the head of the department or agency concerned (31 U.S.C. 203; 41 U.S.C. 15; *infra*, pp. 40-42).

[23] A provision very similar to the Assignment of Claims Act of 1940, but without the "no set-off" clause, was included in Sec. 207 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 205, 40 U.S.C., 407 (1940 Ed.). As stated in that section, its purpose was to provide financial assistance to persons under contract with the United States in connection with the public works program. The section expired June 30, 1943 under the terms of the Act of June 27, 1942, 56 Stat. 410. No cases construing that section have been found.

clause had only a limited application within a larger area of newly permissible assignments—it applied only to certain contracts of the War and Navy Departments—and was certainly not central to the design or purpose of the Act. It is one thing to enact a general validation of assignments to banks to facilitate the financing of contractors. It is another thing to insert a "no set-off" clause which limits the Government's rights as to some of those assignments. And it is still another thing to enlarge that "no set-off" clause so as to bar the offset of tax debts arising out of the performance of the contract. Enlargement of the bar might, it is true, give additional security to the private lender. But a refusal to enlarge the bar would be more consistent with the protective policy of legislation conferring broad set-off powers upon the Government. As between the two, the protective interest of the Government should prevail, especially since the general purpose of the 1940 Act would not be frustrated by the narrower construction of the "no set-off" clause.

3. *The Act of May 15, 1951, and its legislative history*—The subsequent action of Congress throws light on our contention that the offset of tax claims arising as an incident to performance of the contract is not barred by the 1940 Act.[24] The problem

[24] It is a well settled principle of statutory construction that "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; cf. *United States* v. *Hutcheson*, 312 U.S. 219; *Brown* v. *Duchesne*, 19 How. 183, 194.

of financing defense contractors received renewed consideration under the impetus of the stepped-up military program stemming from the Korean conflict. Banking institutions indicated a reluctance to make loans on the basis of an assignment of claims under the borrower's government contracts because of the manner in which the Comptroller General had interpreted the 1940 Act.[25] Two decisions disturbed the banks. In one, the General Accounting Office ruled that payments made to an assignee bank pursuant to the Assignment of Claims Act of 1940 may subsequently be recovered by the Government on account of an overpayment due to price revision.[26] In the second decision—in the instant case—it was ruled that a tax indebtedness which is incident to performance of the contract is not independent of the contract and therefore may be set off against the assignee bank.[27]

To meet this problem, the Board of Governors of the Federal Reserve System recommended changes in the 1940 Act.[28] By the Act of May 15, 1951, 65 Stat. 41 (31 U.S.C., Supp. V, 203, 41 *id.* 15) (*infra*, pp. 42-45), Congress amended the law so as to provide (in so far as relevant here), first, that an assignee bank shall not be liable to make repayment to the United States of any amounts received

---

[25] S. Rep. No. 217, 82nd Cong., 1st Sess., p. 2; H. Rep. No. 376, 82nd Cong., 1st Sess, p. 1.

[26] Comp. Gen. Dec. B-84138 (May 17, 1949). But compare 24 Comp. Gen. 603.

[27] R. 62-67; Comp. Gen. Dec. B-72929 (May 18, 1950). See also, 20 Comp. Gen. 424; 30 Comp. Gen. 98.

[28] H. Rep. No. 376, 82nd Cong., 1st Sess., p. 2.

under an assignment since and after July 1, 1950, and, second, that payments to an assignee under an existing contract containing a "no set-off" clause

> shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States * * * which arises independently of such contract, or *hereafter* for any liability of the assignor on account of (1) renegotiation * * *, (2) fines, (3) penalties * * * or (4), *taxes,* social-security contributions, or the withholding or nonwitholding of taxes or social security contributions, *whether arising from or independently of such contract.* Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued [emphasis added].[29]

It is evident from the language as well as from the legislative history of the 1951 amendment that it was intended as a modification rather than a clarification of the 1940 Act. Thus, the provision barring the Government from recapturing funds already received by an assignee-bank was made retroactive but only back to July 1, 1950, which is the approximate date of the outbreak of the Korean conflict. Had it been simply a clarifying amendment, there would have been no occasion for a cut-off date. And, in sharp contrast, there is no similar retroactivity provided for set-offs of fines, penalties and taxes owed by the assignor. On the contrary, the amplified "no set-off" provi-

[29] See fn. 3, *supra*, pp. 7-8.

sion was only to be effective "hereafter" (*supra*, p. 28).[30]

In this connection, it also seems significant that, despite the sponsors' knowledge of the Comptroller General's ruling in the instant case, the bill, as introduced in both houses of Congress, did not include in its broadened "no set-off" clause any reference to tax claims.[31] The limitation on

[30] Explaining the broadened "no set-off" clause and the purpose of the last sentence of the amending law, (*supra*, p. 28), the House Committee on the Judiciary said (H. Rep. No. 376, 82nd Cong., 1st Sess., p. 4):

> * * * Any "no set-off" clause now contained in existing contracts of the Department of Defense would automatically be enlarged upon the enactment of H.R. 3692 to conform to the amplified clause without the necessity of amending such contracts, and the enlarged clause would be applicable to all payments to be made under such contracts after the date of enactment.
>
> Finally, the bill states specifically that except as otherwise therein provided, it shall not affect or impair rights or obligations accrued prior to the date of its enactment. This is to make it clear that neither the provision relieving assignees from liability to make restitution of amounts received nor the amplified "no set-off" provision contained in the bill implies either approval or disapproval of the construction placed upon the existing provisions of the Assignment of Claims Act by the Comptroller General or by assignees.

[31] Identical bills were introduced in the Senate (S. 998) and in the House (H.R. 2947), 82nd Cong., 1st Sess. The Senate Committee on Banking and Currency, which reported the bill favorably with certain amendments, made note of the Comptroller General's ruling in its report but did not make any recommendation to amend the bill so as to modify that ruling for the future. S. Rep. No. 217, 82nd Cong., 1st Sess., p. 2. A provision prohibiting set-off on account of the assignor's tax liability, even though such liability arose from the assigned contract, was in the draft of the bill prepared by the Board of Governors of the Federal Reserve System. This provision was deleted by the Bureau of the Budget before the bill was introduced in Congress. Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 82nd Cong., 1st Sess., on H.R. 2947, p. 64.

the Government's right to set-off tax claims flowing from the contract came into the bill after extensive hearings by the Committee on the Judiciary of the House, including one addressed specifically to that question.[32] During the course of those hearings, a committee of representatives of the American Bankers Association, other financing institutions, and the General Accounting Office, met with members of the Committee on the Judiciary and revised the proposed bill.[33] The clause as to taxes (*supra*, p. 28) appeared in the revised bill drafted as a result of these consultations. That the new "no set-off" clause was intended to affect only payments to become due after enactment of the bill is patent from the committee's Explanatory Statement in which it was said that the new "no set-off" clause "would affect only payments to be made thereafter. Contracts of the Defense Department containing the existing no set-off clause would not require amendment to come within the new clause, although the new clause would be applicable only to payments to be made after enactment of the amendment." [34]

That the provision as to taxes was intended to modify, and not merely to clarify, the 1940 law is also evident from this Explanatory Statement. The tax provision, the committee stated, was in-

---

[32] Hearings, etc., *supra*, fn. 31, at p. 61 *et seq.*

[33] *Ibid.*, at pp. 61-64. The revised bill was reintroduced as H.R. 3692 and was reported favorably. See fn. 30, *supra*. It was adopted on the floor of the Senate as an amendment to S. 998 (97 Cong. Rec. 4350) and later became the Act of May 15, 1951 (*infra*, pp. 42-45).

[34] Hearings, etc., *supra*, fn. 31, at p. 63.

serted in the revised draft at the request of the financing institutions because, "Without this language * * * the clause would not prohibit set-off on account of any tax liability of the contractor which might not arise independently of the contract * * *."[35]

II

The Trust Fund Provisions of the Internal Revenue Code Do Not Preclude the Set-off.

Petitioner contends (Br. 13) that if a tax indebtedness arising from performance of a contract is dependent on the contract, within the meaning of the 1940 Act, and is therefore subject to set-off, the tax claim in this suit lost its dependent character once the taxes were in fact withheld. It is said that this follows from the requirement of the Internal Revenue Code that whenever any person collects or withholds any tax from another person, the amount so collected or withheld "shall be held to be a special fund in trust for the United States" (I.R.C. 3661, *infra*, pp. 46-47). The theory is that, once the taxes were withheld, the assignor was no longer "indebted" to the United States, but simply a trustee owing the duty to turn over the trust *res* to the United States; and in these circumstances the United States would have no cause of action at all for a general indebtedness, but its "sole remedy" would be in equity to compel the trustee to turn over to it the trust *res*.[36]

---

[35] *Ibid*, at p. 64.

[36] Petitioner also contends that the assignor's indebtedness

The argument is without merit. It ignores the basic factor that the indebtedness was, at the outset and at all times thereafter, an indebtedness of the assignor in its personal capacity, that the indebtedness arose as soon as wages were paid, and that the indebtedness was never discharged. The contention also departs from long established principles favoring construction of revenue statutes so as to give the United States cumulative remedies instead of depriving it of aids in enforcing collection of taxes, and disregards the legislative history of I.R.C. 3661 which clearly shows that its purpose was to accord additional remedies. The argument likewise violates the basic precept of trust law that the beneficiary of the trust may sue the defaulting trustee in an action for debt as well as for breach of trust. In sum, if petitioner's argument were adopted, the United States would be in a worse position where the taxes are withheld than where they are not.

During the course of performing the contract, the assignor deducted and withheld from the salaries and wages of its employees $11,462.91, representing federal unemployment taxes, and $453,469.55, representing withholding of income taxes

---

in this case stems, not from the contract, but from criminal embezzlement of the trust funds. Although petitioner makes frequent reference to "embezzlement," the record (R. 70, 74, 76) reveals that the partners of the assignor company were found guilty of "wilful attempt to evade and defeat the payment of the * * * withheld taxes" under I.R.C. 2707(c). Embezzlement is covered by other statutes, *e.g.*, 18 U.S.C. 648, 649. It is not clear that the partners would have been guilty of embezzlement. See *United States* v. *Johnston*, 268 U.S. 220.

(R. 73).[37] The unemployment tax is imposed on the employee (I.R.C. 1400) but I.R.C. 1401(a) requires that it be collected by the employer "by deducting the amount of the tax from the wages as and when paid."[38] The income taxes were withheld pursuant to I.R.C. 1622(a)[39] which requires that, "Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to" a stated percentage of the wages.[40] The employer is personally "liable for the payment of the tax required to be deducted and withheld" (I.R.C. 1623). Such liability attaches as soon as the wages are paid (I.R.C. 1401), has the same attributes as a tax on the employer himself, and may be collected from the employer whether or not he has deducted the taxes from the wages of the employee. *United States* v. *New York*, 315 U.S. 510, 515-516; *United States* v. *Fogarty*, 164 F. 2d 26 (C.A. 8); cf. *New York* v. *Feiring*, 313 U.S. 283. See also, Treas. Reg. 106, Sec. 402.304. If the employer fails to withhold the tax, but the employee pays it, the employer remains liable for penalties or additions to the tax resulting from his failure to withhold it. I.R.C. 1622 (d); Treas. Reg. 116, Sec. 405.301; *United States* v. *Fogarty*, *supra*, at 33. The

---

[37] With interest and penalties, the assignor's total indebtedness when the contract was terminated was $616,750.95 (R. 74).

[38] These provisions are derived from Sections 801 and 802 of the Social Security Act of 1935, 49 Stat. 620.

[39] This section is derived from the Current Tax Payment Act of 1943, 57 Stat. 126, 128.

[40] Unless inconsistent therewith, all provisions of law applicable to withholding social security taxes are also applicable to the withholding of income taxes. I.R.C. 1627.

amounts withheld are allowed as a credit against the tax imposed upon the employee, whether or not the employer pays such amounts to the Government. I.R.C. 35; *Grasso* v. *Oehmann*, 54 F. 2d 570, 572 (D.C. Mun. App.).[41]

Clearly, then, the tax indebtedness was an indebtedness of the assignor in its personal capacity; it arose "as and when" wages were paid to employees performing the contract; and collection as a tax indebtedness could have been effected from the assignor without regard to whether or not there had been a withholding. Sec. 3661 of the Internal Revenue Code (*infra*, pp. 46-47), impressing a trust upon the moneys withheld, does not effect a discharge of the original indebtedness and does not change the character of the indebtedness; nor does it deprive the Government of its action at law to obtain payment. A person who is required to collect and pay over to the United States another's tax is a debtor of the United States. Such has been the rule both before (*United States* v. *Johnston*, 268 U.S. 220) and after (*United States* v. *First Capital Nat. Bank*, 89 F. 2d 116 (C.A. 8)) the enactment of I.R.C. 3661. The basic fallacy in petitioner's argument (Br. 13) that the assignor was not "indebted" to the United States after the

[41] The employer is not liable to the employee or to any person for the amount deducted and withheld. I.R.C. 1623; cf. I.R.C. 1427, 1608; *Grasso* v. *Oehmann*, *supra*. The withholding of the taxes from the employee's salary effects an immediate change of position so far as the Treasury is concerned. Thus, Treas. Reg. 116, Sec. 405.401 provides, "If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Government by the employer."

taxes were withheld, and that the "sole remedy" of the United States is an action in equity to compel a turnover of the trust *res* or for misappropriation of the funds, lies in petitioner's failure to recognize that the provisions of I.R.C. 3661 creating a trust fund provide an additional, rather than an exclusive, remedy to the Government in aid of the collection of taxes. It has long been settled that the Government may enforce a tax indebtedness by the common law action of debt (*United States* v. *Chamberlin*, 219 U.S. 250, 260-263; *Price* v. *United States*, 269 U.S. 492, 500; *Shriver* v. *Woodbine Bank*, 285 U.S. 467, 478-479; *Milwaukee County* v. *White Co.*, 296 U.S. 268, 271), and that a specific remedy for collection provided in the revenue statute is not to be regarded as the exclusive remedy, but merely as cumulative, unless there is something in the statute or its legislative history to indicate that the United States is to be deprived of its other collection remedies. *Ibid*; *Leighton* v. *United States*, 289 U.S. 506; *Phillips* v. *Commissioner*, 283 U.S. 589. Needless to say, such a deprivation of a remedy to enforce collection of taxes should not be lightly found.

Nothing in the language of Section 3661 suggests that it is to be the exclusive remedy or that other remedies are barred. The legislative history clearly indicates the contrary—that it was intended as an additional remedy to the action for debt. The section was added to the Internal Revenue Code as part of the Revenue Bill of 1934, 48 Stat. 768. The Senate Committee, in explaining the new provision,

stated (S. Rep. No. 558, 73rd Cong., 2d Sess., p. 53):[42]

> Existing law provides with respect to a number of taxes that the amount of the tax shall be collected or withheld from the person primarily liable by another person, who is required to return and pay to the Government the amount of the taxes so collected or withheld by him. This is true, for example, in the case of the taxes on admissions, checks, and telephone and telegraph services. Under existing law the liability of the person collecting and withholding the taxes to pay over the amount is merely a debt, and he cannot be treated as a trustee or proceeded against by distraint. Section 606 of the bill as reported impresses the amount of the taxes withheld or collected with a trust and makes applicable for the enforcement of the Government's claim the administrative provisions for assessment and collection of taxes.

This explanation can hardly be read as indicating that the legislative purpose was to deprive the United States of its remedies for debt and to substitute trust remedies as the sole method. Rather, it is clear that the latter were provided as an additional means of enforcing the collection of taxes. The section is particularly useful in assuring payment or priority where the one who collects the taxes transfers the funds to another, or where the amounts withheld are the subject of

[42] See also H. Rep. No. 1385, 73rd Cong., 2d Sess., p. 32.

an insolvent estate. See, *e.g.*, *United States* v. *Sampsell*, 193 F. 2d 154 (C.A. 9); *Hercules Service Parts Corp.* v. *United States*, (C.A. 6), decided April 2, 1953. If the funds have been kept separately and are identifiable, trust remedies are readily available, but if the funds cannot be traced the United States may assert its claim as a tax indebtedness (as distinguished from a trust indebtedness) and receive priority as such. *United States* v. *New York*, 315 U.S. 510; *In re Frank*, 25 F. Supp. 1005 (S.D. N.Y.); and see second sentence of I.R.C. 3661 (*infra*, p. 47). See also, *Note*, 60 Harv. L. Rev. 786 (1947).

Finally, petitioner's argument (Br. 13) that, with the trust fund intact, the Government's "sole remedy" is an action in equity to compel turning over the trust *res*, and that with the trust fund dissipated, the action is for the amount of the "embezzlement" (by which we assume petitioner means an action for conversion), rather than for a simple indebtedness, is contrary to fundamental principles of the law of trusts. These elementary principles hold that where one person receives money in trust for another and does not live up to the trust, the aggrieved party may sue either for breach of trust *or* for money had and received. Where a trustee is under an immediate and unconditional duty to pay money to the beneficiary, which even petitioner must admit is the situation here, "the beneficiary can maintain an action of debt or general assumpsit or the modern equivalent of these actions under the codes" (2 Scott, *Trusts*, § 198.1). There is no need to resort to equitable

doctrines or to allege that a trust was created and that its *res* was misappropriated. The action against the trustee is simply an action at law for money had and received. *McKee* v. *Lamon*, 159 U.S. 317, 322; *Allen* v. *White*, 17 Wall. 207, 210; *Carl Byoir and Associates, Inc.* v. *Tsune Chi Yu*, 112 F. 2d 885 (C.A. 2), certiorari denied, 311 U.S. 699; Scott, *Trusts*, §§ 198-198.3; *Restatement of Trusts*, § 198.[43] The availability of the action at law for money had and received is highlighted by the fact that here the United States may be regarded, not only as the sole beneficiary of the trust, but also as its settlor. Moreover, the record does not show that any separate fund was set aside or separately deposited which would take on the characteristics of an identifiable trust *res*, without which there may be some question whether the trust provisions of Section 3661 could come into play.[44]

---

[43] For similar reasons, there is no substance to petitioner's argument that there is "lack of mutuality" for the set-off because it is based on an "embezzlement" (Pet. Br. 10-11). Even if such a doctrine of mutuality applies to the United States (see *supra*, pp. 19-20), petitioner's contention falls with its argument that the Government's exclusive remedy is for breach of trust. The United States may waive the asserted "embezzlement" and recover upon an implied contract. *Allen* v. *White*, 17 Wall. 207, 210.

[44] Compare, *In re Frank*, 25 F. Supp. 1005, 1006 (S.D. N.Y.) and *In re Independent Automobile Forwarding Corp.*, 118 F. 2d 537, 539 (C.A. 2), reversed on other grounds, *sub nom.*, *United States* v. *New York*, 315 U.S. 510, with *United States* v. *Sampsell*, 193 F. 2d 154 (C.A. 9); *Hercules Service Parts Corp.* v. *United States*, C.A. 6, decided April 2, 1953; and *Shipe* v. *Consumers' Service Co.*, 28 F. 2d 53, 54 (N.D. Ind.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

SAMUEL D. SLADE,
LESTER S. JAYSON,
Attorneys.

APRIL, 1953.

APPENDIX

1. *Anti-Assignment Statutes*

a. The Anti-Assignment Statute, R. S. 3477, as amended, 31 U.S.C. 203 (1934 Ed.) provided in pertinent part as follows:

> 203. Assignment of claims void.—All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.
> * * *

b. The Assignment of Claims Act of 1940, 54 Stat. 1029, 31 U.S.C. 203, provided as follows:

> AN ACT
>
> To assist in the national-defense program by amending sections 3477 and 3737 of the Revised Statutes to permit the assignment of claims under public contracts.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That sections 3477

and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written

notice of the assignment together with a true copy of the instrument of assignment with—

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department [45] or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

SEC. 2. This Act may be cited as the "Assignment of Claims Act of 1940."

c. The Act of May 15, 1951, 65 Stat. 41, 31 U.S.C., Supp. V, 203, provides as follows:

---

[45] Amended so as to include the Department of the Air Force by the Act of July 26, 1947, 61 Stat. 501, 508, 31 U.S.C., Supp. III, 203.

AN ACT

To facilitate the financing of the defense contracts by banks and other financing institutions, to amend the Assignment of Claims Act of 1940, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Assignment of Claims Act of 1940, approved October 9, 1940 (54 Stat. 1029), is amended by striking out all after clause 3 of the proviso and inserting in lieu thereof the following:

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

"Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940, as amended, shall constitute a valid assignment for all purposes.

"In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such

contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

"Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter, for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or

under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

"Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued."

2. *Set-Off Statutes*

a. 62 Stat. 942, 28 U.S.C. 1503, provides as follows:

§ 1503. Set-offs.

The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

b. R.S. 236, as amended, 42 Stat. 24, 31 U.S.C. 71, provides as follows:

SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

3. *Internal Revenue Code*

The Internal Revenue Code provides in pertinent part as follows (26 U.S.C.):

§ 1400. Rate of tax.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages * * *.

§ 1401. Deduction of tax from wages—(a) Requirement.

The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) Indemnification of employer.

Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

§ 1622. Income tax collected at source—(a) Requirement of withholding.

Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to the sum of the following: * * *

§ 1623. Liability for tax.

The employer shall be liable for the payment of the tax required to be deducted and with-

held under this subchapter, and shall not be liable to any person for the amount of any such payment.

* * * * *

§ 3661. Enforcement of liability for taxes collected.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

U. S. GOVERNMENT PRINTING OFFICE 1953 250720 1470